IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 302 of 2004
With
CRIMINAL REVISION APPLICATION No. 303 of 2004
With
CRIMINAL REVISION APPLICATION No. 319 of 2004
To
CRIMINAL REVISION APPLICATION No. 330 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VADGAM JUTH SEVA SAHERAI MANDALI LIMITED - Applicant(s)

Versus

VASUBHAI KARSANBHAI RATHOD & 1 - Respondent(s)

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Appearance :
MR SHIRISH JOSHI for Applicant(s) : 1,
MR NV SOLANKI for Respondent(s) : 1,
MR HM PRACHCHHAK APP for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 20/10/2005

COMMON ORAL JUDGMENT

1. By filing instant batch of 14 Criminal

Revision Applications under Section 397 read with Section 401 of the Code of Criminal Procedure ('the Code' for short), the petitioner ('the complainant' for short) seeks to challenge the common judgment and order dated 21.4.2004 rendered in Criminal Revision Application Nos.30 of 2003 to 43 of 2003 by the learned Additional Sessions Judge, Dhrangadhra, by which 14 Criminal Revision Applications filed by respondent No.1 in each petition ('the accused' for short) came to be allowed and thereby common order dated 4.11.2003 rejecting the applications seeking discharge from the prosecution filed by the accused in Criminal Case Nos. 52 of 2003 to 54 of 2003, 172 2003 to 187 of 2003, 214 of 2003, 215 of 2003, 242 of 2003 and 266 of 2003, has been quashed and set aside and thereby the applications filed by the accused came to be allowed and the proceedings initiated by the complainant against the accused for commission of the offence under Section 138 of the Negotiable

Instruments Act ('the Act' for short) have been dropped.

2. The complainant is a Co-operative Society and as a part of its activities, it advanced loan to the accused in all the petitions. As against the outstanding amount of the loan advanced to the accused, all the accused issued cheques in favour of the complainant society drawn on Surendranagar District Cooperative Bank Limited, Patdi Branch from their accounts. The aforesaid cheques were returned when submitted for clearance with the endorsement “funds insufficient”. The complainant, therefore, issued notice under Section 138 of the Act to all the accused which were duly received by them but they did not pay the amount within 15 days of the issue of the notice as required under section 138 of the Act.

3. The complainant therefore filed 14 criminal

complaints against all the accused in the Court of learned JMFC, Patdi, District Surendranagar along with the photocopy of the cheque, return memo issued by the bank and also copy of the notice.

4. After nine months from the date of filing of the complaint, the accused filed application in each of the complaints, seeking their discharge from the prosecution on the grounds mentioned in the applications.

5. The learned JMFC, Patdi, after hearing the learned advocates appearing for the parties, rejected the application vide order dated 4.11.2003 holding that the claim made by the complainant was not time barred and the contentions advanced by the accused in each application cannot be decided without recording evidence.

6. Aggrieved thereby, all the accused filed separate Criminal Revision Applications being Criminal Revision Application Nos.30 of 2003 to 43 of 2003 in the Court of learned Additional Sessions Judge, Dhrangadhra, who, after hearing the learned advocates appearing for the parties, came to the conclusion that the complaint filed by the complainant against each of the accused is without obtaining the authorisation from the Cooperative Society and hence not maintainable and, therefore, in exercise of powers conferred under Section 258 of the Code, dropped the proceedings initiated by the complainant against the all the accused vide order dated 21.4.2004 which has given rise to present 14 separate petitions at the instance of the complainant.

7. Mr. Shirish Joshi, learned advocate for the complainant in all the petitions, has contended that the complaints filed by the complainant are summons triable cases and, therefore, they are to

be conducted as per the procedure mentioned in Chapter XX of the Code and in Chapter XX there is no provision to discharge the accused once the complaint is filed and registered before the learned JMFC and who has issued process thereunder. According to him, it is true that there is a provision under Section 258 of the Code to drop the proceedings in certain cases but that can be exercised only in cases other than on a complaint, meaning thereby, if the prosecution is filed by the State then this section may be attracted. In the instant case, the complaint is filed by a private complainant i.e., a cooperative society and therefore provisions of Section 258 of the Code cannot be attracted and hence the order passed by the learned Additional Sessions Judge is dehors the provisions contained under Chapter XX of the Code.

8. In support of the aforesaid contention, he has relied upon a decision of the Supreme Court

in the case of John Thomas v. Dr. K. Jagadeesan, (2001) 6 SCC 30 and also an unreported judgment dated 29.9.2005 rendered in Criminal Revision Application No.516 of 2005 by this Court laying down the proposition that the provisions of section 258 of the Code cannot be attracted in a complaint filed by a private party in the midst of the trial. Besides this, it is also pointed out by him that the learned JMFC has very rightly rejected the applications filed by the accused seeking their discharge from prosecution observing that whatever contentions they have raised in the applications are defences which can be examined at the time of trial and it is not possible to examine them without recording the oral evidence of the parties. According to Mr. Joshi, learned advocate for the complainant, the impugned common order passed by the learned Additional Sessions Judge is required to be quashed and set aide by allowing these revision applications and thereby restoring the complaints

filed by the complainant against each of the accused.

9. Mr. N.V. Solanki, learned advocate for respondent No.1/accused has contended that it is true that after the judgment in John Thomas's case (supra), provisions of Section 258 of the Code cannot be attracted in a complaint filed by a private party as it is attracted only in the case of a complaint otherwise than upon a complaint i.e., a complaint instituted by the State. Therefore, in view of the pronouncement of the Apex Court, the impugned order passed by the learned Additional Sessions Judge is required to be quashed and set aside. However, according to him, in the case of Adalat Prasad v. Rooplal Jindal and others, 2004 (7) SCALE 137, the Supreme Court has held that the Magistrate has no inherent power for review and Criminal Court has no inherent power to recall its order. However, the remedy lies in invoking Section 482 of the

Code. According to him, in the above referred to judgment, the Supreme Court has in terms held that the accused can invoke provisions of Section 482 of the Code by taking appropriate proceedings before the High Court. Therefore, liberty may be reserved in favour of the accused to move this Court seeking quashment of the complaint on the same grounds which the accused have mentioned in the applications filed by them before the learned JMFC seeking their discharge from the prosecution. He therefore urged to pass appropriate order.

10. Mr. HM Prachchhak, learned APP for respondent No.2 – State of Gujarat has urged that the State of Gujarat has also challenged the same common judgment and order passed by the learned Additional Sessions Judge by filing seperate 13 Criminal Revision Applications being Criminal Revision Application Nos. 749 to 761 of 2004 which are also listed on the board today. He

therefore submitted that in view of the settled principles enunciated by the Supreme court in John Thomas's case (supra) as well as the unreported judgment dated 29.9.2005 of this Court rendered in Criminal Revision Application No.516 of 2005, appropriate orders may be passed in this group of petitions. He, therefore, urged to allow all the petitions filed by the complainant as well as the State of Gujarat by restoring the complaints filed by the complainant.

11. This Court has considered the submissions advanced by Mr. Shirish Joshi, learned advocate for the complainant, Mr. NV Solanki, learned advocate for the accused and Mr. HM Prachchhak, learned APP for respondent No.2 – State of Gujarat, perused the common judgment and order rendered in Criminal Revision Applications by the learned Additional Sessions Judge, Dhrangadhra as well as the order passed by the learned JMFC,

Patdi and the decisions cited at the bar.

12. So far as the factual matrix of filing of separate 14 criminal complaints before the learned JMFC, Patdi against the accused who are loanee by the complainant under section 138 of the Act is concerned, there is no dispute. By filing applications before the learned JMFC, Patdi in those criminal complaints, the accused prayed to discharge them from prosecution on the grounds that the complaint was filed without taking authorisation from the cooperative societiy as well as the debts were time barred. The learned JMFC rejected the aforesaid applications. Aggrieved thereby the accused filed Criminal Revision Applications in the Court of learned Additional Sessions Judge, Dhrangadhra. The learned Additional Sessions Judge allowed the Criminal Revision Applications filed by the accused against the order of the learned JMFC, Patdi and thereby allowed the applications filed

by the accused seeking their discharge from the prosecution.

13. There is no dispute that complaints were filed by the complainant against the accused for commission of the offence under Section 138 of the Act. All the cases were to be tried as summons trial as offence under Section 138 of the Act is punishable with imprisonment for a term which may be extended to two years or with fine or with both. The trial of summons case by the Magistrate is prescribed in Chapter XX of the Code and as per the said Chapter, there is no stage for passing order of discharge of the accused from the prosecution. Section 258 of the Code is in relation to power to stop proceedings in certain cases, which reads as under:

> “In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of

the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."

14. Provisions of the aforesaid section in terms stipulate that section 258 of the Code can be attracted only in cases other than on a complaint, meaning thereby, if the prosecution is filed by the State then this section shall be attracted. In the instant case the complaint is filed by a private party and, therefore, according to this court, provisions of this section cannot be attracted.

15. A perusal of the impugned judgment and order passed by the learned Additional Sessions Judge, it is seen that the learned Additional Sessions Judge has considered the averments made in the applications filed by the accused as truth without testing them during the trial. According to this court, those averments are defences which can be examined at the time of fullfledged trial after examining and cross-examining the witnesses offered by both the parties. So far as the finding recorded by the learned Additional Sessions Judge that the complaints filed by the complainant are without obtaining authorization from the cooperative society is concerned, it is not correct because it is at a premature stage as the same can be decided at the time of trial only.

16. In John Thomas's case (supra), the Supreme Court has held as under:

"Summons cases are generally of two categories: those instituted upon complaints and those instituted otherwise than upon complaints. The latter category would include cases based on police reports. Section 258 of the Code is intended to cover those cases belonging to one category alone i.e., "summons cases instituted otherwise than upon complaints". Thus it has no application to cases instituted upon complaints.

The segment separated at the last part of the section by the words "and in any other case" is only a sub-category or division consisting of "summons cases instituted otherwise than upon complaints". That sub-category is not intended to cover all summons cases other than those instituted on police report. In fact, Section 258 vivisects only "summons cases instituted otherwise than on complaints" into two divisions. One division consists of cases in which no evidence of a

material witness was recorded. The section permits the court to acquit the accused prematurely only in those summons cases instituted otherwise than on complaints wherein the evidence of material witnesses was recorded. But the power of the court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all."

17. The principle enunciated by the Supreme Court in the above referred to judgment has been followed by this Court in an unreported judgment dated 29.9.2005 rendered in Criminal Revision Application No.516 of 2005.

18. Applying the principles laid down by the Supreme Court in the above referred to judgment and the principle laid down by this Court in the unreported decision in Criminal Revision

Application No.516 of 2005 to the facts to the present case, at the cost of repetition, be it stated that the complainant has filed the complaints under Section 138 of the Act and the offence under Section 138 of the Act is punishable for maximum period of imprisonment of two years or with fine or with both. Therefore, the learned Magistrate has to conduct the complaint filed by the complainant as a summons trial, the procedure of which is prescribed under Chapter XX of the Code wherein there is no stage for discharging the accused from prosecution in the midst of the trial and the power of the Court to exercise this power is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all. Admittedly, the complaint filed by the complainant is not a case instituted otherwise than on complaint. Therefore, the learned Additional Sessions Judge has misinterpreted Section 258 of the Code and wrongly discharged

the accused from the prosecution.

19. Seen in the above context, according to this court, the learned Additional Sessions Judge, Dhrangadhra has committed a serious and grave illegality and infirmity in passing the impugned order which does not stand to scrutiny and, therefore, the impugned judgment and order deserves to be quashed and set aside by allowing all these Criminal Revision Applications.

20. For the foregoing reasons, all the Criminal Revision Applications filed by the complainant succeed and accordingly they are allowed. The impugned common judgment and order dated 21.4.2004 passed by the learned Additional Sessions Judge, Dhrangadhra in Criminal Revision Application No. 30 of 2003 to 40 of 2003 is hereby quashed and set aside, the result of which is that the order dated 4.11.2003 passed by the learned JMFC, Patdi rejecting the applications

filed by the accused for discharging them from the prosecution is upheld and as a consequence thereof all the complaints filed by the complainant against the accused are ordered to be restored to its original file.

21. The concerned JMFC, Patdi is hereby directed to proceed with the trial of the criminal cases and dispose them of as expeditiously as possible as per the time limit prescribed in section 143 of the Act.

Rule issued in each of the petitions is made absolute.

22. So far as the 13 Criminal Revision Applications being Criminal Revision Application Nos. 749 to 761 of 2004 filed by the State of Gujarat against the common judgment and order dated 21.4.2004 rendered in Criminal Revision Application Nos.30 to 43 of 2003 by the learned

Additional Sessions Judge, Dhrangadhra, are concerned, they are also allowed by this Court by recording a separate common judgment in those Criminal Revision Applications today.

(A.M. Kapadia, J.)

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